OAH 80-3100-31416

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

W.R.,

Petitioner,

vs.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

Independent School District #279,
Osseo Area Schools,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge LauraSue Schlatter on May 27, 2014 at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota. Respondent Osseo Area Schools (District) filed a post-hearing memorandum on June 11, 2014. Also on June 11, 2014, by prior agreement of the parties, the District filed copies of its Policy Number 423, which was accepted as the District's Exhibit 26. Petitioner W.R. (Petitioner) filed his post-hearing memorandum on June 13, 2014 and the record closed on that date.

Charles R. Shreffler, Shreffler Law PLLC, and Mark W. Ostlund, Law Office of Mark W. Ostlund, appeared on behalf of Petitioner. Margaret Westin, General Counsel for the Osseo Area Schools, appeared on behalf of the District.

The proceeding was a single bifurcated hearing. During the hearing, the parties addressed the issue of whether the Petitioner had voluntarily resigned from the District or whether the District discharged him. The parties separately addressed the question, whether, if a discharge occurred, the discharge was for misconduct or incompetency.

STATEMENT OF ISSUES

1) Whether the Petitioner was entitled to a Veterans Preference Hearing because the District discharged him from employment, or whether he voluntarily resigned and, therefore, is not entitled to a Veterans Preference Hearing?

2) If the Administrative Law Judge concludes that the Petitioner was entitled to a Veterans Preference Hearing because on the District discharged him from employment, the second issue is whether the Petitioner was removed for misconduct or

incompetence and what, if any, relief should be awarded under the Veterans Preference Act?

3) Whether the Petitioner is entitled to attorney's fees pursuant to Minn. Stat. § 15.472?

SUMMARY OF CONCLUSIONS

The Administrative Law Judge concludes that the Petitioner resigned voluntarily from his employment and was not entitled to a Veterans Preference Hearing.

Because the Administrative Law Judge concludes that the Petitioner was not entitled to a Veterans Preference Hearing, the Administrative Law Judge need not reach the question of whether the Petitioner was removed for misconduct or incompetence and what, if any, relief should be awarded under the Veterans Preference Act.

Even if the District discharged Petitioner and he was entitled to notice and a hearing under the Veterans Preference Act, the Administrative Law Judge concludes that the District demonstrated, by a preponderance of the evidence, that its discharge of Petitioner was based on substantial evidence of misconduct that relates to the way in which Petitioner performed his duties.

Petitioner is not entitled to attorney's fees under Minn. Stat. § 15.471.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Background

1. The Petitioner is an honorably discharged veteran within the meaning of the Veterans Preference Act (VPA).[1]

2. The District is a public employer within the meaning of the VPA.

3. The Petitioner was hired by the District in the fall of 2009 to work as a Bus Educational Services Professional (ESP).[2]

Termination versus Discharge

4. On November 12, 2013, Petitioner was called into a meeting with his supervisor Troy Schreifels. Petitioner's union representative Katherine (Becky) Hespen accompanied Petitioner to the November 12, 2013, meeting. Mr. Schreifels informed Petitioner that two complaints had been made concerning his interactions with students,

[1] *See* Exhibit (Ex.) 2; Minn. Stat. § 197.447.
[2] Testimony (Test.) of W.R.; Ex. 22.

and that Petitioner would be placed on suspension with pay pending an investigation of the complaints.[3]

5. On November 13, 2013, Petitioner was suspended with pay.[4]

6. On November 21, 2013, Petitioner was asked to participate in a *Loudermill* hearing with Mr. Schreifels, Judy McDonald, the District's Director of Human Resources; and Laurel Anderson, another Human Resources staff person familiar with the investigation of the complaints against Petitioner. Ms. Hespen was also present at the November 21, 2013 meeting.[5]

7. During the November 21, 2013 meeting, the District informed Petitioner Petitioner of the substance of its investigation of the two complaints that Mr. Schreifels had discussed with him at the November 12, 2014 meeting. Petitioner then presented his responses to the District's findings concerning the two complaints.[6] Then Ms. McDonald, Ms. Anderson and Mr. Schreifels left the room. Petitioner and Ms. Hespen had an opportunity to consult in private.[7]

8. Ms. Hespen told Petitioner that he might be facing allegations of gross misconduct and was going to be discharged. She told him that if he was discharged under those conditions, he would likely not get unemployment and it would be difficult to get another job in the future. She told Petitioner that he had the option of resigning to avoid being fired so that he would not have a record of having been fired and so that he could collect unemployment benefits.[8]

9. Ms. McDonald and Mr. Schreifels returned to the room where Petitioner and Ms. Hespen had been talking. Ms. McDonald told Petitioner and Ms. Hespen that they were going "to initiate the process for termination of employment."[9] Ms. Hespen asked whether the District would accept Petitioner's resignation. Ms. McDonald was hesitant to accept because she was concerned for the safety of children in other school districts where Petitioner might become employed in the future. Ultimately, she decided she could recommend Petitioner's resignation to the Board because she thought he was remorseful about his conduct.[10]

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[3] Test. of Becky Hespen, Troy Schreifels, W. R.
[4] Ex. 13.
[5] Test. of B. Hespen, T. Schreifels, W. R., Judy McDonald. A *Loudermill* hearing is named after the court case, *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487 (1985), in which the Court held that due process requires a school district to provide an employee an opportunity to respond to charges against him before taking employment action against the employee. The *Loudermill* hearing can be an informal meeting, as long as the employee is made aware of the specific basis for potential action against him and is given a chance to tell his side of the story.
[6] Test. of W. R., J. McDonald.
[7] Test. B. Hespen, J. McDonald.
[8] Test. B. Hespen.
[9] Test. J. McDonald.
[10] Test. of J. McDonald.

10. At the end of the meeting, Petitioner signed a form letter of resignation provided to him by Ms. McDonald on behalf of the District. The form was effective November 21, 2013 and stated the reason for his resignation was personal.[11]

11. The Board of Education (Board) had to take formal action approving either the recommendation to accept the letter of resignation from Petitioner or a recommendation for discharge of Petitioner.[12]

12. In a letter dated November 25, 2014, the District's human resources office sent Petitioner a letter acknowledging his letter of resignation and informing him that the human resources office would recommend that the Board accept the resignation at the Board's regular meeting on December 3, 2013.[13]

13. At no time during or after the November 21, 2013 meeting was Petitioner given a written Notice of Intent to Discharge or informed of his rights to a hearing under the Veterans Preference Act.[14]

14. On March 31, 2014, Petitioner filed a Petition with the Commissioner of Veterans Affairs pursuant to Minn. Stat. § 197.481 alleging that the District violated his rights under the VPA, Minn. Stat. § 197.46, when it terminated him without providing him with a Notice of Intent to Discharge or a hearing in which the District showed incompetence or misconduct. In his Petition for Relief, Petitioner requested full reinstatement, back wages, back benefits and reimbursement for attorneys fees, pursuant to Minn. Stat. § 15.471.[15]

15. The Commissioner of Veterans Affairs issued a Notice of Petition and Order for Hearing on April 9, 2014, and ordered that a contested case hearing be held on May 26, 2014.[16] In the Order for Hearing, the Commissioner stated that the purpose of the hearing would be "to determine whether Petitioner's veterans preference rights, as granted under MN Stat. 197.46 have been denied." If the Administrative Law Judge found that the Petitioner's veterans preference rights were not violated or denied, the Commissioner's Order for Hearing indicated that the Judge "may provide a RECOMMENDATION that the Commissioner DISMISS the Petition and Order." On the other hand, if the Judge determined that the Petitioner's veterans preference rights were violated or denied, the Order for Hearing directed the Administrative Law Judge "to continue and complete the Veterans Preference Hearing, and provide the Commissioner a RECOMMENDATION whether the Petitioner's requests, stated or related, should be DENIED or GRANTED, with each Granted Item so specified."[17]

Unemployment Benefits

[11] Ex. 2.
[12] Test. of J. McDonald.
[13] Exs. 3 and 4.
[14] Test. of W. R., J. McDonald.
[15] Notice of Petition and Order for Hearing.
[16] Because May 26, 2014 was a state holiday, the date was later changed to May 27, 2014.
[17] Notice of Petition and Order for Hearing at 1-2 (emphasis in original).

16. Following his resignation, Petitioner applied for unemployment benefits. In a letter dated December 18, 2013, the Department of Employment and Economic Development (DEED) notified Petitioner he was ineligible for unemployment benefits because he had resigned from his job for a personal reason not related to his employment.[18]

17. Petitioner appealed the denial of unemployment benefits. Following a hearing on the unemployment appeal, an Unemployment Law Judge granted Petitioner's application for unemployment benefits based on a finding that Petitioner resigned only after being told that he would be discharged if he did not resign. The Unemployment Law Judge also found that Petitioner's conduct while employed with the District did not rise to the level of misconduct. The District did not participate in the appeal.[19]

18. The Notice of Decision of the Unemployment Law Judge states that Minn. Stat. § 268.105, subd. 5a, "provides that the findings of fact and decision issued are only for unemployment benefits purposes and do not affect any other legal or contractual matter."[20]

Misconduct or Incompetency

November 1, 2013 Complaint

19. On November 1, 2013, Troy Schreifels, the District's Assistant Transportation Director, received a complaint regarding Petitioner. The complaint was from the mother of a student. The student's mother told Mr. Schreifels that she was upset because the day before, on October 31, 2013, Petitioner had shared his religious beliefs with her child, who was a student riding on a bus on which Petitioner was serving as the ESP. Mr. Schreifels obtained a video recording of the bus ride where the alleged conversations occurred.[21] The mother claimed that Petitioner stated people who believe in God and are Christian will go to heaven and everyone else will go to hell. Petitioner also allegedly told the student that there is no Santa Claus. The parent felt that it was inappropriate for Petitioner to have these conversations with her child.[22]

20. Mr. Schreifels discussed this complaint with the Petitioner during their meeting on November 12, 2014. The Petitioner agreed that he said the things the student's mother alleged he said, but claimed he also asked the students what they believed about heaven and hell and about the meaning of Christmas and Santa Claus.[23]

[18] Ex. 22, Doc. No. B3200-014.
[19] Ex. 22, Doc. No. B3600-001.
[20] Ex. 203, p. 1.
[21] The video of this bus ride is part of Ex. 11. The conversation is difficult to hear in its entirety, although parts of it are audible.
[22] Test. of T. Schreifels, Exs. 11 and 12.
[23] Exs. 11, 12, Test. of W. R.

During the same bus ride, the Petitioner also discussed the meaning of Easter and the Easter Bunny, and Halloween, with students.[24]

21. Petitioner told Mr. Schreifels during their November 12 meeting that the conversations he had had with students regarding religion, including his personal religious beliefs, were appropriate. Mr. Schreifels told him such conversations were not appropriate to have with students on the school bus.[25]

November 11, 2013 Complaint

22. On November 11, 2013, Mr. Schreifels received a second complaint against Petitioner. The second complaint came from a psychologist with a different district attended by a student who rode a bus on which Petitioner provided ESP services. The complaint was that, on November 7, 2013, Petitioner had pushed or shoved another student on the bus that the reporting student rode. After hearing the psychologist's complaint, Mr. Schreifels obtained a video recording of the bus ride in question.[26]

23. The video recording shows Petitioner riding on a bus with two students. The students are sitting on opposite sides of the aisle from one another. Student A, on the left, yells several times at Student B, on the right. Petitioner tells Student A to sit closer to the window, away from Student B, which Student A does at first, but then flails toward the center aisle and Student B. After being reprimanded by the bus driver and Petitioner, Student A retreats, and sits silently. While Student A remains seated silently, Petitioner announces to the bus driver that he is going to move Student A forward. He goes to Student A, gets him from his seat, walks him forward two rows and puts him in another seat, shoving him slightly down. A struggle ensues as the Petitioner attempts to fasten Student A's seat belt. Student A can be heard saying "I've got it!" yet the Petitioner continues to bend over, very close against Student A, obscuring the view so it is unclear exactly what is happening. This continues for over a minute, with the Petitioner bent over Student A and the student struggling and yelling off and on. Finally, as the Petitioner stands up, Student A lashes out at him, screaming and crying. The Petitioner shoves Student A back. The Petitioner calls him a cry baby. Student A swings at the Petitioner with his backpack, which the Petitioner grabs and throws to the back of the bus. The Petitioner then returns to his own seat.[27]

24. Student A appears to be approximately 11 or 12 years old, and at least six to eight inches shorter than Petitioner. When Student A stands in front of Petitioner, his head comes well below Petitioner's shoulder. At no time during the video does Student A appear to pose a serious physical threat to anyone else on the bus.[28]

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[24] *Id.*
[25] Ex. 12.
[26] Test. of T. Schreifels, Ex. 11.
[27] Ex. 11.
[28] Ex. 11.

25. The Petitioner asserted during his November 12, 2014 interview with Mr. Schreifels that Student A hit Student B with his seat belt.[29] The video does not show Student A hit Student B with a seat belt.[30]

26. When asked whether the situation could have been handled differently, the Petitioner responded "Yes, the student should be in a harness and restrained." The Petitioner acknowledged that perhaps Student B could have been moved. When asked why he called Student A a cry baby, Petitioner responded that it was because he was crying.[31]

Earlier Complaints and Warnings

27. There was a history of earlier complaints and disciplinary actions against Petitioner. On December 3, 2009, he received a Reprimand for Unsatisfactory Performance. The reprimand was issued the day after Petitioner yelled at students to try to get them to follow his directions, told one student to "shut up" and "demeaned and threatened verbally" another student.[32] In addition to the written reprimand, Petitioner was warned that failure to "maintain a professional and appropriate relationship with students" could result in termination of employment. He was instructed to review his manual regarding his ESP duties and to complete further training as directed by his supervisors.[33]

28. On April 26, 2011, Robert Stewart, a District bus driver, wrote up a report (called a T.I.R.E.S. Bus Ticket) regarding an incident in which Petitioner yelled at an autistic child and called him a cry baby. During the same bus ride, after the first student began to cry, the Petitioner continued to yell at the students on the bus and to threaten to move them.[34]

29. On April 13, 2012, Petitioner was suspended without pay for three days for his "continued inappropriate interaction and communication with students."[35] Specifically, on April 9, 2012, Petitioner argued with a student who was not wearing her seat belt, and called her a "dummy." The Notice of Suspension documents that Petitioner had been counseled about similar behavior on at least four earlier occasions by his supervisor. The Notice also stated "If you continue to show a pattern of inappropriate interaction and communication with students and, therefore, not meet the expectations of your job it will result in further discipline up to and including discharge."[36]

[29] Ex. 12.
[30] Ex. 11.
[31] Ex. 12
[32] Ex. 8.
[33] *Id.*
[34] Ex. 9, Test. of T. Schreifels.
[35] Ex. 10.
[36] Ex. 10, Test. of T. Schreifels, J. McDonald.

30. From the time he was hired, Petitioner participated in a number of training sessions on District policies and procedures, including the District's corporal punishment policy and the District's Love and Logic program.[37]

District Policies and Procedures

31. District Policy 507 prohibits District employees from inflicting corporal punishment upon a student either to "reform unacceptable conduct or as a penalty for unacceptable conduct."[38] The Corporal Punishment Procedure defines Corporal Punishment as "A. Hitting or spanking a person with or without an object, or B. Unreasonable physical force that causes bodily harm or substantial emotional harm."[39] If a District employee "strikes, hits, grabs or attempts to apply unreasonable force to a student, or in a violent, rude or angry manner touches or lays hands upon the student" the employee must notify the principal immediately and submit a written report of the incident to the principal before leaving the building for the day.[40]

32. Reasonable force may be used if necessary to "restrain a student from self-injury or injury to any other person or property" but such force must be reported.[41]

33. District Policy 423, titled Employee-Student Relationships, states:[42]

> The District is committed to providing an educational environment in which all students are treated with respect and dignity. Every District employee is to provide students with appropriate guidance, understanding, and direction while maintaining a standard of professionalism and acting within accepted standards of conduct.
>
> . . . .
>
> Teachers and other District employees should act in a way that acknowledges and reflects their inherent positions of authority and influence over students.

34. To the extent that the Memorandum that follows explains the reasons for these Findings of Fact and contains additional findings of fact, including findings on credibility, the Administrative Law Judge incorporates them into these Findings.

Based upon the foregoing Findings of Facts, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

[37] Ex. 5; Test. of W. R., B. Hespen.
[38] Ex. 6, p. 1.
[39] Ex. 6, p. 2.
[40] Ex. 6, p. 2.
[41] Ex. 6, p. 1.
[42] Ex. 26.

1. Pursuant to Minn. Stat. §§ 14.50 and 197.481, the Administrative Law Judge and the Commissioner of Veterans Affairs have the authority to determine if the Petitioner has the right to a hearing under the VPA prior to discharge from employment and, if so, whether there was a proper basis for the District to terminate the Petitioner's employment and what, if any, relief is appropriate under the VPA.

2. When issuing the Notice of Petition and Order for Hearing, the Department of Veterans Affairs (Department) substantially complied with all substantive and procedural requirements of statute and rule, and this matter is properly before the Administrative Law Judge. The Petitioner's Petition for Relief was received by the Department on March 31, 2014.

3. The Petitioner is an honorably discharged veteran within the meaning of the VPA.[43]

4. The District is a political subdivision of the state of Minnesota within the meaning of the VPA.[44]

5. The parties have complied with all relevant substantive and procedural requirements of statute and rule and this matter is properly before the Administrative Law Judge.

Termination versus Discharge

6. Minn. Stat. § 197.46 provides in part:

> No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.

7. Under Minn. R 1400.7300, subp. 5, the Petitioner has the burden of proof to establish by a preponderance of the evidence that he was removed from his employment with the District and denied his rights under the VPA, Minn. Stat. § 197.46.

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[43] Minn. Stat. § 197.447 defines "veteran" for purposes of the VPA to mean:

> [a] citizen of the United States or a resident alien who has been separated under honorable conditions from any branch of the armed forces of the United States after having served on active duty for 181 consecutive days or by reason of disability incurred while serving on active duty, or who has met the minimum active duty requirement as defined by Code of Federal Regulations, title 38, section 3.12a, or who has active military service certified under section 401, Public Law 95-202. The active military service must be certified by the United States secretary of defense as active military service and a discharge under honorable conditions must be issued by the secretary.

[44] *See* Minn. Stat. § 197.46.

8. Minnesota courts have held that "a veteran who resigns, voluntarily or involuntarily, without good cause attributable to the employer is not entitled to notice and hearing under the VPA."[45]

9. The Petitioner resigned voluntarily, without good cause attributable to the employer because: 1) the District had not yet begun termination proceedings when Petitioner initiated the offer to resign; 2) Petitioner chose to forego his right to a discharge hearing during which he would have been entitled to ongoing payments of his salary; and 3) the District never requested Petitioner's resignation.

10. Because Petitioner voluntarily offered his resignation on November 21, 2013, he failed to show that he was removed from his employment with the District and denied his rights under the VPA.

11. Had the Petitioner demonstrated that he was discharged without the required written notice of the District's intent to terminate him, or of his right to request a hearing under the VPA within 60 days of receipt of the notice of intent to discharge, in violation of Minn. Stat. § 197.46, he would have been entitled to his wages and benefits as if he had held the position consistently through the date of the Commissioner's Order.[46] Because unemployment compensation received by the veteran must be deducted from a veteran's back pay award, the amount of unemployment compensation received by the Petitioner between November 21, 2013, and the date of the Commissioner's Order would be required to be deducted from any award of back pay to the Petitioner.[47]

12. Because the Petitioner voluntarily resigned from his position, he is not entitled to receive back pay or benefits.

Misconduct

13. Had the Petitioner demonstrated that he was discharged and was not given written notice of the District's intent to terminate him, he would have been entitled to a hearing to determine whether he was dismissed from employment for misconduct or incompetency.[48]

14. Minnesota courts have concluded that "[t]he cause or reason for dismissal must relate to the manner in which the employee performs his duties, and the evidence showing the existence of reasons for dismissal must be substantial."[49]

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[45] *Brula v. St. Louis County*, 587 N.W.2d 859, 862 (Minn. Ct. App. 1999).
[46] *Kurtz v. City of Apple Valley*, 290 N.W.2d 171, 173-174 (Minn. 1980).
[47] *See, e.g., Robertson v. Special School District No. 1*, 347 N.W.2d 265 (Minn. 1984); *Johnson v. City of Apple Valley,* 536 N.W.2d 336 (Minn. Ct. App. 1995); *Pawelk v. Camden Township*, 415 N.W.2d 47, 52 (Minn. Ct. App. 1987); *Kurtz,* 290 N.W.2d at 174; *Perttu v. City of Keewatin,* OAH Docket No. 4-3100-14123-2, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION (2001).
[48] Minn. Stat. § 197.46.
[49] *Leininger v. City of Bloomington,* 299 N.W.2d 723, 726 (Minn. 1980), *quoting Ekstedt v. Village of New Hope*, 292 Minn. 152, 161-63, 193 N.W.2d 821, 826 (1972).

15. The employer bears the burden to show by a preponderance of the evidence that its disciplinary action is reasonable.[50]

16. Factors that may be considered in this regard include "the veteran's conduct, the effect upon the workplace and work environment, and the effect upon the veteran's competency and fitness for the job."[51]

17. The discipline imposed on the veteran may be modified if the employer acted unreasonably[52] or there are extenuating circumstances that demonstrate that the discharge was unwarranted.[53]

18. The District bears the burden to show by a preponderance of the evidence that its conduct was reasonable.[54]

19. The District has demonstrated that its decision to discharge the Petitioner under these circumstances was reasonable. The Petitioner has not demonstrated that extenuating circumstances exist that render termination unwarranted at this time.

20. The Petitioner is not entitled to reinstatement to his position with the District.

21. Minnesota Statutes, section 15.471 does not permit an award of attorney's fees to an individual person. As an individual person, the Petitioner is not eligible to petition for an award of attorney's fees based on Minnesota Statutes, section 15.471.

22. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

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[50] *In re Schrader*, 394 N.W.2d 796, 802 (Minn. 1986), *rehearing denied* (Nov. 21, 1986).
[51] *Schrader,* 394 N.W.2d at 802.
[52] *State ex rel Laux v. Gallagher*, 527 N.W.2d 158, 161 (Minn. Ct. App. 1995); *Myers,* 409 N.W.2d at 853; *In re Schrader*, 394 N.W.2d 796, 802 (Minn. 1986), *rehearing denied* (Nov. 21, 1986).
[53] *Schrader,* 394 N.W.2d at 802.
[54] *Schrader,* 394 N.W.2d at 802; *Lewis v. Minneapolis Bd. of Educ.,* 408 N.W.2d 905, 907 (Minn. Ct. App. 1987), *review denied* (Minn. Sept. 23, 1987).

RECOMMENDATION

IT IS RECOMMENDED THAT:

The Commissioner of the Minnesota Department of Veterans Affairs **DENY** the Petition for Relief.

Dated: July 23, 2014

s/LauraSue Schlatter
LAURASUE SCHLATTER
Administrative Law Judge

Reported: Digitally Recorded; No Transcript Prepared

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Larry W. Shellito, Commissioner, MN Department of Veterans Affairs, 206c Veterans Service Building, 20 West 12th Street, St. Paul, MN 55155-2079, (651) 757-1555, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Termination versus Resignation

Under the VPA, no qualified veteran holding a position in public employment "shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing." [55] As an initial matter, the Administrative Law Judge is charged with determining whether Petitioner's veterans preference rights under Minn. Stat. § 197.46 were denied. The parties do not dispute that Petitioner is an honorably discharged veteran. Nor do they dispute that, on November 21, 2013, Petitioner turned in a letter of resignation after being told the District was going to initiate termination proceedings, and the Human Resources Director Ms. McDonald accepted the resignation letter but did not provide Petitioner with a discharge notice pursuant to the VPA.

The Administrative Law Judge must determine whether the resignation was a voluntary resignation for purposes of the VPA or if it was made under duress caused by the District, and thus effectively a discharge. Minnesota courts have analyzed the question of whether an employee's resignation is actually a discharge in several different ways, depending on the context.

In the context of VPA cases, the courts first asked whether a veteran's *involuntary* resignation was with good cause attributable to the employer.[56] In *Johnson*, the court held that a "resign or be terminated" choice was in effect a removal.[57] In *Brula v. St. Louis County*,[58] the Court of Appeals held that a veteran who resigns, voluntarily or involuntarily, *without* good cause attributable to the employer was not entitled to notice and hearing under the VPA. The veteran in *Brula* resigned due to an inability to work because of Post-Traumatic Stress Disorder. The Court of Appeals found that the resignation was without good cause attributable to the employer. In discussing the policy behind the VPA in the context of the situation in which Brula found himself, the Court of Appeals said "while the legislature recognized that veterans should be protected [from the political spoils system] in public employment, there is no showing that the legislature intended to protect veterans from themselves."[59]

In this case, Petitioner was not facing a "resign or be terminated choice" imposed upon him by the employer. The District informed him, after the *Loudermill* hearing, that it intended to proceed with a termination process. The District did not request or even encourage the Petitioner to resign. There was no evidence that the District wanted to make any kind of a deal with Petitioner. Petitioner was facing a likely discharge, although he did not know for certain that the Board would approve a recommended discharge. No one told the Petitioner that he had to resign or he would be terminated.

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[55] Minn. Stat. § 197.46.
[56] *Johnson v. County of Anoka,* 536 N.W.2d 336, 338 (Minn. Ct. App. 1995), *rev. denied* (Minn. Sept. 28 1995).
[57] *Johnson* at 339.
[58] *Brula v. St. Louis County*, 587 N.W.2d 859, 861 (Minn. Ct. App. 1999).
[59] *Brula* at 862.

Brula discusses several unemployment compensation cases concerning the question of resignation versus discharge, noting that the unemployment cases are analogous to the VPA cases for purposes of analyzing this issue. In *Seacrist v. City of Cottage Grove*, the court held that when an employee chose to resign rather than exercise his right to appeal an alleged misconduct determination, the employee was not entitled to unemployment benefits.[60] Here, Petitioner chose to avoid a possible termination process, to request to be permitted to resign and to ask the District to not interfere with his attempt to collect unemployment benefits. The Petitioner saw a benefit to himself of fairly certain cash payments and an employment record that did not include a termination. He asked for that, the District agreed. The VPA is not designed to protect the Petitioner from his own actions.

The Administrative Law Judge finds that Petitioner chose, voluntarily, to resign his position from the District. The District did not violate the VPA by failing to give the Petitioner notice under the Act. Therefore, the Administrative Law Judge recommends that the Commissioner deny the Petition.

Misconduct

Because the Administrative Law Judge conducted a single, bifurcated hearing, the issue of misconduct was included in the record. In the event that the Commissioner disagrees with the Administrative Law Judge's recommendation and decides that the Petitioner was forced to resign, and grants the Petition, the Administrative Law Judge includes in this Memorandum a discussion of the reasons for finding that the Petitioner committed misconduct and his discharge was supported by substantial evidence.

The District presented evidence that the Petitioner had a history, dating back to 2009, of receiving feedback from supervisors regarding repeated instances of speaking inappropriately to students. The school policies regarding requirements that staff treat students respectfully are clear. Petitioner was warned at least twice before the incidents in 2013 that if he did not improve, he could be subject to further discipline, up to and including discharge. He was suspended without pay in 2011 for yelling abusively at students. Petitioner received ample training on how to work with students, but his training and the warnings did not seem to make a difference, long term. While he did go for periods of time without any reported incidents, Petitioner was not able to control his temper with the students consistently over time.

The two incidents in late October and early November of 2013 were the "final straws" from the District's point of view. Because the District had properly provided training, warnings, and progressive discipline over the years, it appropriately moved to inform the Petitioner on November 21, 2013, following its investigation and a *Loudermill* hearing, that it intended to initiate the termination process. There is no question that Petitioner's misconduct directly related to his duties. His duties were to insure the safety and security of the students riding the buses. Part of his job was to make certain that the students were treated with dignity and respect.

[60] *Brula* at 861, *citing Seascrist v. City of Cottage Grove,* 344 N.W.2d 889, 891-92 (Minn. Ct. App. 1984).

The religious discussion that included statements that people who did not share his Christian beliefs would go to hell, and that Christmas, Easter and even Halloween should be celebrated in a particular way violated the school's policy and procedure 423 concerning Employee-Student relationships. The incident involving the student Petitioner moved on the bus including behavior by the Petitioner such as hovering very closely over the student, possibly holding him down for over a minute while buckling his seatbelt, ignoring the student's screaming and crying. Petitioner shoved the student, threw his backpack to the back of the bus and called him a cry baby. Petitioner failed to report the incident to the school. This incident violated the Corporal Punishment policy and procedure, number 507.

The District met its burden of showing, by a preponderance of the evidence, that its discharge of Petitioner was based on misconduct that relates to the way in which Petitioner was required to perform his duties. Therefore, the discharge for misconduct was appropriate and should be affirmed.

L.S.